



No. 46.

Motion to modify

Office Supreme Court U. S.
FILER

FEB 5 1900

De Cree Clerk.

Supreme Court of the United States

Filed Feb. 5, 1900.

OCTOBER TERM, 1899.

No. 46.

THE LOUISVILLE AND NASHVILLE RAILROAD

COMPANY ET AL., APPELLANTS.

728.

HENRY W. BEHLMER, APPELLEE.

MOTION TO MODIFY DECREE

And now comes Claudian B. Northrop, Counsel for Appellee, as of record, and moves the Court to modify its decree herein, by ordering that each party pay his own costs, instead of decreeing that all the costs of all the various tribunals be paid by Appellee.

Respectfully submitted,

CLAUDIAN B. NORTHROP,

Counsel for Appellee.

The attention of the Court is called to the fact that in its opinion it was pointed out that pending the progress of this cause through the Courts below, and since it was heard by the Inter-State Commerce Commission, this Court has handed down several decisions, settling the law on the much disputed and intricate question of competition. This Court evidently intended to indicate that the Commission and the lower Courts should be excused for erring in their interpretation of the law in this case, for the reason that the law was unsettled and undecided at the periods when this cause was before the lower tribunals.

May it not be hoped that Appellee will likewise be excused on this ground, and that his estate will not be mulcted with the entire costs? He has already paid all the costs in Circuit Court of Appeals.

It would be a hardship to cast all the costs on Appellee, because two out of the three lower tribunals misconceived the law which was afterwards settled. Appellee takes the liberty of assuming that this was not intended.

Leave is also respectfully asked, to point out, that Appellee in all the lower tribunals expressly requested that competition should be considered, and that all the *facts* relating thereto should be weighed, and that printed requests for findings of fact were filed before the Commission, on the point of competition, and on the issue of reasonableness.

Appellee was anxious to have the *facts* of his case passed on, and endeavored to avoid doubtful matters of law. It is not his fault that his efforts failed.

He began these proceedings with the practical business

object of opening a flour and grist mill in the town of Summerville, the prevailing rates prohibiting the enterprise.

In the event of final failure his intention was to invest his capital, and locate at a long distance point or "trade center." He had considerable confidence in that provision of the Act which requires that the tribunals "shall proceed to hear and determine the matter speedily."

Respectfully submitted.

CLAUDIAN B. NORTHROP,
Solicitor for Appellee.